A PERPLEXITY OF "*PER MY ET PER TOUT.*"[1]

Mr. Gilbert, barrister, finds in the law material for Mr. Gilbert, purveyor of innocent merriment. Ruddigore, hitting, in desperate search for a new crime, upon the device of forging his own will, and Pooh-Bah of multitudinous personality amuse the laity. Yet the law takes very seriously the composite gentleman who does business with himself by correspondence; and if A, in virtue of his legal duality, can bargain with and write to and from himself, why may he not in one capacity forge his name in the other?

The fact that Mr. Healey—less numerous than the survivor of the Nancy brig yet more so than Cerberus—was, in the eye of the law, four gentlemen at once—a tenant in common with Mr. Valentine and a partner with Mr. Zabriskie, as tenant in common a landlord of himself and as partner his own tenant,—and the further fact that in these various capacities he was lawfully entitled to write to and from and bargain with himself, gave him some advantage over the less complex Mr. Valentine who, being merely twofold in personality, a tenant in common and a landlord, went to law with his co-tenant in the year of grace 1892, upon the prevalent American theory that a majority should rule, only to discover after a decade's litigation that a one-quarter undivided interest in realty and six judges may prevail over a three-quarter like interest and ten judges; that a case may be thrice tried before a jury with no opportunity to jurors of passing upon its merits—except outside the box; and that two successful appeals in the Supreme Court, concurred in by all sitting judges, seven in number, (or eight if one, sitting twice, be counted each time), may be reversed by five judges of the Court of Appeals against the dissent of their two colleagues;—in other words, that out of

[1] Being the case of Valentine *v.* Healey & Zabriskie, 86 Hun 259; 1 App. Div. 502; 158 N. Y. 369.

fourteen appellate judges the opinions of nine may be outweighed by those of five or three less than a majority, in a case wherein, to quote from the dissenting opinion, "the facts are all admitted on the record, and they are so clear and simple that it is impossible to be misled by any suggestion outside of the controversy."

These simple facts so far as they have transpired in the record up to this time, the last trial being on March 24th, 1902, are as follows: On May 30th, 1891, Mr. Valentine, the plaintiff, and Mr. Healey, the defendant, owned in common the fee of certain realty in New York City, their respective interests being three-fourths and one-fourth. Presumably neither gentleman was conversant with the mystery of "*per my et per tout*," whereby a tenant in common holds at once by the moiety and the altogether. Mr. Healey was at the same time a general partner with Mr. Zabriskie in the firm of Healey & Co. which contained also a special partner who, being neither *dramatis persona* nor even in the chorus, is a negligible quantity. Upon that 30th day of May Messrs. Valentine and Healey by a written "indenture" let their said realty to the firm of Healey & Co. for the term of one year beginning, as expressed in the lease, on May 1st, 1891, or twenty-nine days before execution of the lease. The yearly rent of $8,500 was made payable quarterly in sums allotted specifically to each lessor, namely, $1,593.75 to Valentine and $531.25 to Healey. This "indenture" contained among other covenants these: that said lessees might continue the lease for two years, upon notice in writing to *each* lessor and signature and exchange of agreements prior to February 1st, 1892; that in case of unpaid rent or default in any covenant the lessors might re-enter; that the lessees should not make alterations without the permission of *each* of the lessors; that any difference arising between the parties as to proper performance of agreements of the lease should be referred to three persons, one named by Mr. Valentine, one by the lessees and the third by the two so chosen, the decision of the majority to bind,—a fond provision, as the event showed, against litigation; and that at the expiration of the term the lessees should quit and surrender the premises. The firm thereupon, as the answer expressly admits, "entered into occupation and possession

of the said premises *under the said lease* * * * and continued in such possession and occupation pursuant to such agreement up to the 1st day of May, 1892," and, after the latter date, "continued and remained in the occupation of the said premises."

These facts are admitted by the pleadings, which at this point diverge: the complaint alleging that the occupancy after May 1st, 1892, constituted an election by the firm to continue the lease for another year, *i. e.* created a hold-over lease, and that a quarter's rent, becoming due on August 1st, 1892, was not paid, for his part of which the plaintiff demanded judgment; while the answer, denying that the continued occupation was an election to continue the tenancy and that quarterly rent had become due, alleged to the contrary that prior to May 1st, 1892, the defendants notified Valentine and Healey of their election to discontinue their tenancy at the expiration of said term and, further, that their use and occupation after the term's expiration was under a new and express agreement with Healey, co-owner of the fee, constituting a license, terminable at a week's notice, which permitted the lessees to continue in occupancy, at the rate of rental reserved in the lease, during their convenience or until a new tenant was obtained; pursuant to which license defendants continued in possession until May 31st, 1892, when they surrendered possession to Healey and paid the rateable amount of rent due.

Upon this state of pleadings arose the simple issue: Did the admitted holding over constitute, at plaintiff's election, a new lease or did defendants remain in possession as licensees?

On the first trial[1] to sustain his cause the plaintiff merely

[1] The case was first tried before Mr. Justice Beach and a jury on Jan. 24th, 1895, and the complaint dismissed; this judgment was reversed by the unanimous General Term, Van Brunt, P. J., writing, O'Brien and Follett, JJ., concurring, April, 1895. The second trial before Mr. Justice Patterson and a jury on October 17th, 1895, resulted in a direction of a verdict for plaintiff, which judgment was affirmed by the Appellate Division, Feb. 1896, Williams, J., writing, Van Brunt, P. J., Barrett, Rumsey and Ingraham, JJ., concurring. This affirmance was reversed by the Court of Appeals, Feb. 1899, Haight, J., writing, Gray, Bartlett, Martin and Vann, JJ., concurring, O'Brien, J., reading for affirmance, Parker, C. J., concurring. Motion for reargument denied and the case again tried before Mr. Justice O'Gorman and a jury March 24th, 1902, who felt constrained by the prevailing appellate opinion to dismiss the complaint for the second time.

offered his copy of the indenture—bearing at foot three seals, one blank space for signature, and the signatures of Warren M. Healey and of Healey & Co.—called a single witness to prove the admitted occupancy by the firm after May 1st, 1892, and that it was of a nature to preclude other occupancy, the latter part of which testimony was excluded, and rested. Whereupon the court granted a motion under exception to dismiss the complaint:

"on the ground that it did not state facts sufficient to constitute a cause of action, and that the continued occupation was the occupation of Mr. Healey, the co-tenant and co-owner of the property, and that he being in rightful possession under a legal title, his exercise of that legal right could raise against him by presumption of law, no liability for rent, in the absence of some express agreement made between himself and his co-owner."

Upon this record plaintiff's exceptions were heard in the first instance at General Term, which unanimously reversed the judgment below arguing, in substance, thus: While the New York cases lay down the rule that

"Where a tenant in common is in exclusive possession of the common property by virtue of his own title, unless he actually excludes the co-tenant, he is not liable to such co-tenant, even for use and occupation;"[1]

still the case at bar is not within that rule for the reason that Healey & Co., including Healey the co-tenant, admittedly went into and held possession of the entire premises, including Healey's share, under the lease from both owners; whereas in the cases cited to support the ruling below the co-tenants held their own shares by virtue of their co-tenancy, leasing only the moiety of their co-owners.

"There was," said the court in the case at bar, "no claim or pretence of going into possession because of any title except that derived from the lease. Now it being conceded and admitted by the pleadings that the possession was of this character, where is there any room for an assumption, when the tenants hold over, that they are in possession because of any other title than that of lessee? There is no pretence that any other title has been acquired since the execution of the lease, or that any other rights have devolved upon the defendants or either of them. It would seem under such circumstances that the ordinary rule in reference to holding over must necessarily apply. It would have been entirely different if Hea-

[1] Mumford *v.* Brown, 1 Wend. 53; McKay *v.* Mumford, 10 Wend. 351; Dresser *v.* Dresser, 40 Barb. 300; Wilcox *v.* Wilcox, 48 Barb. 329. The English rule was said to be otherwise upon the authority of Leigh *v.* Dickeson 12 Q. B. Div. 194.

ley or his firm had accepted a lease of only the plaintiff's interest in this real estate, and if Healey had gained possession of the real estate because of his title and had not entered under the lease."

It was accordingly held that, this difference between the case at bar and all others cited being substantial,—the ordinary rule as to holding-over should apply to the former.

With this opinion of General Term for guidance the case again went to trial, and the plaintiff once more rested his case upon the lease, the pleadings and the testimony as to occupancy after the term. Thereupon, on the ground that the plaintiff's witness to occupancy had testified that the defendants were in possession on May 1st prior to the execution of the lease on May 30th, the defendants moved for leave to amend their answer to conform to proof by striking out its admission that they entered under the lease and inserting an allegation putting that fact in issue. This motion being denied they moved to dismiss the complaint

" on the ground that the defendant Healey being the owner in fee of one-fourth of the premises in question had a legal right at any and all times to occupy each and every part of the common property, and that his exercise of that legal right *in the absence of any evidence tending to show an infringement of the rights of his co-tenant*[1] or a legal ouster, could not raise against him by a presumption of law any liability."

This motion being in turn denied, the defendants offered in evidence the following letters, which were excluded as immaterial, irrelevant and incompetent but allowed to be printed for the information of the court:

" April 29th, 1892.

" WARREN M. HEALEY, Esq.,
" 1478 Broadway.

" DEAR SIR:—We desire to inform you that as indicated by our failure to exercise the option expressed in your lease to us for the past year, and as verbally stated to you yesterday by our representative, Mr. Thorne, that we shall not renew said lease. We understand that the premises have not been rented for the coming year and shall be pleased to continue to occupy the same for a few weeks from the first of May next in order to suit our convenience in moving, paying *pro rata* rent for such use and occupation.

" Very truly yours,
" HEALEY & CO."

[1] The italics are ours.

"NEW YORK, 29th April, 1892.

"Mess. HEALEY & Co.,

"1478 Broadway.

"GENTLEMEN:—Your letter of even date to hand. You are at liberty to continue to occupy the premises at No. 313 to 319 West 43d St. at a *pro rata* rent for the period of such occupancy. This privilege is accorded you only with the understanding and agreement that such occupancy is to be terminated on a week's notice from either party in order that we may take advantage of any opportunity that may offer to rent the premises for the entire year.

"Very truly,

"WARREN M. HEALEY."

Mr. Healey then testified to his one-fourth ownership in the premises and its occupancy by his firm between May 1st and May 30th; whereupon the defendants rested and judgment was directed for the plaintiff.

Thus it appears that the sole differences between the new record and that of the former trial were (1) the defendants' offer of the excluded letters without any evidence of their having ever been brought to the knowledge of the plaintiff lessor, entitled under the lease to receive both written notice of defendants' intent to exercise the option of renewal and a share of rent by specific allotment, and also individually to appoint one arbitrator in case of dispute between the parties—and (2) Mr. Healey's testimony to his co-tenancy and his firm's occupancy of the premises, prior to the execution on May 30th of the lease which, by its terms nevertheless, took effect on the 1st day of May, and was, as the answer admitted, the title whereunder the lessees entered into possession.

The Appellate Division unanimously affirmed the judgment below, seeing no reason for dissent from the conclusion of the General Term and nothing for their consideration except the disallowance of the amendment and the exclusion of the correspondence. As to the former point it was held that the disallowance was not a breach of discretion—it being immaterial whether the defendants were in possession before the lease since they had

"assumed to be and were in possession under the lease and that alone during the term of one year. The lease established the relation of landlord and tenant and they could not be in possession under any other claim during the term of the lease."

The exclusion of the correspondence was also held to have been proper for the reason that

"it was immaterial and if admitted would not have changed the result. * * * The notice that the lessees would not renew the lease even if it had been given to both lessors would not of itself have avoided the legal effect of the holding over after the expiration of the term."[1]

As to Mr. Healey's letter consenting that his firm might hold over, the court said that it would have been effective if he had had power to bind the plaintiff, but that it was not plain that Mr. Valentine had any knowledge of the correspondence;

"the lease by its terms made rent payable to each of the tenants in common according to their respective interests in the property. Healey was not authorized to act for plaintiff as his agent or otherwise, and the consent could not be operative as plaintiff's consent in any way."

Healey being in possession and occupancy *at the time the consent was given* not as owner but merely as one of the partners, lessees, the court said that neither he nor his firm could change the relations which they had assumed during the term "so as to affect the plaintiff's rights under the lease without his knowledge or consent," and that this consent, *given before the expiration* of the term, could not avoid the legal effect of the holding over if it was not avoided by reason of his membership in the firm.

The Court of Appeals drew a different conclusion from this record and held, upon the authority of McKay *v.* Mumford (*supra*), that although the case at bar was distinguished by the General Term, and distinguishable, from McKay's case by the fact that Healey was not sole lessee but one of the firm to which the lease ran, still there was no reason why *at the expiration of the lease* he might not assume his authority over the premises as owner and tenant in common with right to occupy the whole thereof and preserve it from waste or injury "so long as he did not interfere with the right of his co-tenant to also occupy the premises."

Accordingly the exclusion of the correspondence was held to be reversible error for these reasons: (1) the firm's letter would have shown the intent of the lessees not to hold over, and Healey's would have shown "that he not

[1] "Schuyler *v.* Smith, 51 N. Y. 309; Haynes *v.* Aldrich, 133 *Id.* 287.

only gave his consent to the company to hold over but that he assumed his relation to the premises as owner," thus explaining the answer's admission of continued possession and justifying such action; (2) the lease was executed by Healey and not by the plaintiff,—an inference apparently based solely upon the omission of the plaintiff's signature from his copy of the "indenture"[1] which was put in evidence,—and therefore the plaintiff by acquiescing therein and accepting rent had recognized Healey's authority to act in his behalf and justified the firm in assuming that its partner was authorized to treat with reference to the leasehold; in other words the excluded letters should have been admitted to show that the holding over was by permission of one of the owners whose authority to represent his co-owner, the defendants, including the licensing owner himself, had a right to assume. This theory of Healey's agency appears never to have occurred to the defendants; it was not suggested on their brief nor, the dissenting opinion says, even advanced on the argument, and was directly contradictory of what the court below had assumed as undisputed, that "Healey was not authorized to act for the plaintiff as his agent or otherwise."

From this prevailing opinion there was vigorous dissent. O'Brien J. stated the question in the case to be whether a partnership taking possession of realty under a lease is exempt from the general rules governing the relation of landlord and tenant because of the membership in the firm of a co-owner of the property. He found the answer in the fact that the co-tenancy and the partnership were distinct legal entities, the lease having been made between the co-owners as landlord and the partnership as tenant; and that this relationship was not affected by the extraneous fact that one of the lessees of the entire estate was also a co-owner. He argued that the covenant for surrender of possession became nugatory if the firm could hold over on

[1] "Indenture" at common law is a written instrument in counterparts the serrated edges of which fit together. The term implies an agreement in duplicate, although carelessly used of agreements by a single instrument. But the Court of Appeals has lately held, in Michaels *v.* Fishel in 169 N. Y. 281, that the use of a technical term by one learned in the law raises a presumption of its use in the common law sense,—"re-enter" in a lease being held to mean not entry by summary proceedings but the right to maintain ejectment.

the license of its member who was co-owner, and reasoned that as, between tenants in common, a deed severs forever the unity of possession, so this lease which, as to all property taken thereunder, was a conveyance for a limited period, suspended that unity and all relations of co-ownership between the parties during its term substituting therefor the relation of landlord and tenant. Thus Valentine, the covenants of the lease being observed, could not have entered upon the demised premises except as a trespasser, but, in default of payment of rent, could have instituted summary proceedings; while Healey & Co. could have asserted their exclusive possession and proceeded against Valentine for trespass if interfered with in their rights as lessees; all of which suppositions were inconsistent with the relation of tenants in common. The relation of landlord and tenant continued during the lease and could only be terminated by surrender of possession pursuant to the covenant, until which surrender the tenancy continued under the lease. The excluded correspondence was characterized by the dissenting opinion as "a very transparent device that ought not to mislead any court," proving nothing except that Healey had assented to the holding over by his firm, an assent ineffective to change the obligations of the lessees to their landlord; for if Healey after possession taken under the lease could have changed those obligations in one regard he might have done so in all others, reducing for instance, or even remitting, the rental. From this reasoning it was concluded that the only just and consistent rule for such a case is to hold that the relations of co-tenants are suspended and in their place those of landlord and tenant substituted by the lease and these new relations are not changeable during the term by either party without the other's consent. Under this rule the correspondence was properly excluded as an attempt by Healey, one of the lessees, to defeat the rights of his fellow landlord by releasing himself and his firm from the covenant to surrender possession and substituting therefor a license to occupy indefinitely. It was suggested on the defendant's brief that the case was a hard one for appellant, a suggestion emphatically rejected by the dissenting judges; who also refused to infer from the omission of Valentine's signa-

ture that Healey was his agent upon the grounds that there was nothing to show that such omission was not a scrivener's or printer's error, that the admission by the pleadings that the lessors united in the lease could not be contradicted by an inference from the appearance of that document on the record, that the findings of the lower court negatived such inference and that, both sides having asked a direction of a verdict, the defendants were precluded from raising any question except upon admitted or undisputed facts.

The case having been sent back for trial under the guidance of the prevailing opinion, the plaintiff proved these new facts not theretofore appearing in the record; that he was owner with Mr. Healey prior to May 1st, 1891; that he signed the counterpart of the indenture which was delivered to the lessees; that the counterpart offered in evidence indicated by pencil initials that his signature was to have been put in the vacant place; that upon April 28th, 1892, he had distinctly refused the oral request of the defendants' attorney that they might continue in possession for a less period than that of an annual lease, and had subsequently repeated this refusal in writing; and that the property being thus held over against his wishes after the termination of the lease was exclusively occupied by defendants. It further appeared from the testimony of the defendant, Mr. Healey, that he was substantially Healey & Co.; that his partner, Zabriskie, in negotiating the lease acted absolutely under his, Healey's, directions; that after Valentine's refusal to suffer occupancy of the premises except under a yearly lease the defendants' attorney suggested the correspondence between Mr. Healey, co-owner, and Mr. Healey, member of the leasing firm; that after Mr. Healey had completed the correspondence with himself on the morning of April 29th, a copy of the letter signed by Healey & Co. was mailed to Valentine at 7 o'clock P. M. of that day and not received by Mr. Valentine until 4.30 P. M. of the following day, May 30th, the day before the expiration of the lease; and that Mr. Valentine immediately wrote and sent by hand to the lessees the following letter:

"NEW YORK, April 30th, 1892.

"Messrs. HEALEY & CO.,

"GENTLEMEN: Your letter of the 29th inst. did not reach me until 4.30 P. M. to-day.

"You have already been informed that I would renew the lease of the factory for one year at the same rent as in the present lease, but would not let it for a shorter period.

"As your letter only repeats your request for a few weeks' occupancy, from May 1st, my answer repeats my refusal to grant it.

"Truly yours,

"HENRY C. VALENTINE."

Mr. Justice O'Gorman, at the conclusion of the case, ruled that in substance the record was the same as that before the Court of Appeals, presenting a case wherein against the wishes of his co-tenant the owner of one-fourth of the realty permitted a firm, of which he was a member, to remain in occupancy; that while it is well settled that the holding over of a lessee establishes a presumption that he is occupying under a lease, such presumption does not arise where one of the lessees is a tenant in common in the demised property; and further that the Court of Appeals had substantially held that the presence of other partners did not in this case affect the rule of tenant in common, while the fact that one lessee was also a co-owner of the demised realty did take the case out of the general rule of landlord and tenant. Upon this understanding of the opinion in the highest court he was constrained to dismiss the complaint.

Such is the condition of this curious case. The eventual settlement of the vexed question of law will depend upon whether the appellate courts, if the case be taken up, shall decide that the new evidence adduced by the plaintiff on this last trial did substantially change the record as presented in the first two trials.

It is too broad a statement to say that the Court of Appeals granted the new trial upon the ground that the element of partnership did not affect the rights of the tenant in common. Such a contention was urged upon the court but does not seem to have been—certainly was not in terms—accepted. Nor was the refusal to allow amendment of the answer criticised. The reversal was solely upon the ground that it was error to exclude the letters signed by Healey & Co., and Warren M. Healey for two reasons which may be now reconsidered, with reference to the new record, in their reverse order. The second of them was that the omission of Mr. Valentine's name from the copy of the lease in evidence implied Healey's agency in negotiating that

lease and justified Healey & Co. in considering their senior partner—who on the last trial testified that whatever his partner Mr. Zabriskie did with reference to the lease was done under his direction—as consenting on Mr. Valentine's behalf as well as his own to their indefinite holding over. This theory of agency was of course disposed of by Mr. Healey's admission just referred to, and also by the positive testimony that the counterpart of the lease signed by Mr. Valentine was delivered to Healey & Co.; the omission, where leases are exchanged between landlord and tenant, of the former to sign the copy retained by him being of common occurrence. The inference that Healey & Co. were justified in supposing that Mr. Healey was authorized by Mr. Valentine to consent to their holding over would seem entirely disposed of by the new evidence showing that as to this lease Mr. Healey was himself Healey & Co., that Mr. Valentine had refused orally to the defendants' attorney and by letter to the lessees prior to the expiration of the lease to suffer any occupancy of less than a year; and that the excluded correspondence was admittedly suggested by counsel after this refusal was known.

This theory of agency being out of the case there remains the first ground upon which the Court of Appeals rested its decision. This is based upon the ruling in McKay *v.* Mumford[1]:

"As to a tenant who has no title, except by the lease under which he enters, if he continues after its expiration, his possession in contemplation of law, is in subordination to the landlord's right, because the law will not presume him disloyal. But no such presumption exists against a tenant in common. The fact of his not leaving possession does not authorize the inference that he still intends to hold under the lease; on the contrary, the presumption is that he holds under his own title, which gives him a right to the possession and enjoyment of the whole estate, liable, however, to account to his co-tenant at law."

Of this rule the court says that while the General Term recognized it they distinguished McKay's case from Valentine's *by the fact that Healey was not the sole lessee but a member of the firm to which the lease ran* and adds "in this respect the cases are distinguishable, but we fail to see why Healey, *at the termination of the lease*, may not assume his authority over the premises as an owner and a tenant in common. As

[1] 10 Wend. 351.

such tenant in common he had the right to take and occupy the whole of the premises and preserve them from waste or injury *so long as he did not interfere with the right of his co-tenant* to also occupy the premises " (The italics are ours). Accordingly it was said, as we have already seen, that the letter of Healey & Co., if received in evidence, would have negatived intent on their part to hold over under the lease (which of itself was immaterial since a tenant cannot by such notice escape his obligation)[1] while Healey's letter would have shown resumption by him of his tenancy in common and his consent as co-owner to his firm's occupancy. But the chief distinction drawn by the lower court between McKay's case and that at bar was, not only that the lease ran to the firm of Healey & Co. but that it was a lease of the entire property, of the entire interest in the property of each co-tenant. In McKay *v.* Mumford there were also two tenants defendants, whether partners or not does not appear. But these lessees only leased from the plaintiffs a moiety of the interest in the realty concerned; the other moiety they avowedly held by virtue of the co-ownership of one of them and their occupancy of that was at no time under the lease but always by virtue of his ownership. It would appear that the co-owner and the defendant E. Mumford, but not his co-lessee, had shown unwillingness to yield possession of the leased moiety but only, so far as can be spelled out from the decision, because *after the expiration of the lease* he asserted a right to remain in the occupancy of the whole as a tenant in common. There was no evidence whatever that before such expiration he and his co-lessee had applied to the lessors for permission to remain in possession of the leased moiety and, such permission having been refused, had remained in occupancy despite that refusal. In the case at bar it was in evidence that Healey & Co. before the expiration of their lease applied to Mr. Valentine as landlord for permission to remain on indefinitely, thus recognizing his right to grant or refuse such a request, and upon his refusal applied to Mr. Healey,—or at least Mr. Healey applied to himself,—for like permission on April 29th, *while the lease was still in force* and the rights and obligations

[1]Schuyler *v.* Smith (*supra*).

of Mr. Healey thereunder still existent. Not only were these applications to remain in possession a recognition of the existing relations of landlord and tenant, but it would seem that Mr. Healey's note consenting to the further occupancy implied that he was writing not individually as tenant in common but as landlord with and representing Mr. Valentine; for he makes no assertion of individual title but expressly says that the occupancy is to be terminable on a week's notice "in order that *we* may take advantage of an opportunity that may offer to rent the premises for the entire year." As tenant in common he would have no right to license the lessees, against the express and known refusal of his co-tenant, to continue in exclusive possession of Mr. Valentine's interest, the rent of which was specially reserved to him, for the determinate period of one week, at least, and beyond that indefinitely. It cannot be doubted that such a permission by one co-tenant in the teeth of the other's known dissent is an infringement of the latter's rights. If Mr. Healey could have granted such a license on April 29th, 1892, the lease being still in force, he could just as well have granted it on May 1st, 1891, the day after the lease was signed. To this extent the record seems to have been changed and the case brought within the rule laid down in the prevailing opinion.

Nor is there anything left in the record as presented at the last trial to justify an assumption either that Mr. Healey, *after the expiration of the lease*, assigned to his firm his rights as tenant in common or that he ever entered upon the surrendered premises and occupied the whole of them, *without interfering with his co-owner's rights*, in order to protect them from waste. There is no evidence in the record that possession of the premises was ever surrendered as covenanted by the lessees. On the other hand Mr. Valentine's refusal to assent to any occupancy after the lease's expiration was tantamount to a demand for surrender of his interest and notice that further occupancy of it would be regarded as yearly tenancy. In this respect the facts are totally different from the early case of Mumford *v.* Brown (*supra*) wherein a tenant in common held over in the entire premises, but not until after, in reply to his co-tenant's demand, he had offered to surrender the moiety not his own. In the

case at bar there is no indication of any willingness by either defendant to surrender possession of Valentine's interest but on the contrary ample evidence that the same exclusive possession that was granted under the lease was continued against his will. Mr. Healey doubtless had a right to assign his own interest at any time during the lease, subject to the covenants of that instrument. But he never had a right to assign or give possession of the entire estate against his co-tenant's express wishes, or to modify the terms of the lease, to which he has assented and under which, according to the admissions of his answer, he and his firm were in possession during its term. To do these things was clearly to infringe his co-owner's right. And yet it seems very plain that he did both of these things, when against the will of his co-tenant, he licensed his firm and himself to occupy the entire estate, including Valentine's share, for an indefinite period not in any event less than a week, and that therefore, however his assent may have affected his own interest, the holding over of Valentine's share against his known dissent established, as to three-fourths of the estate, a violation of the covenant to surrender and a continuance of the relation of landlord and tenant at Valentine's election.

If the foregoing is not the logical conclusion of the matter, then it may be regarded as established law in the State of New York that one tenant in common of realty, however small his interest, may release any firm of which he may be a member, or of which he may not be a member, from a written lease of his co-owner's share to which he has himself assented under seal; and we may reasonably doubt, until the determination of the case upon the new record, that such a rule will be established by final adjudication.

W. A. PURRINGTON.